United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1710

To be argued by
JOHN N. BUSH

B

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1710

P/S

UNITED STATES OF AMERICA,
Appellee,

—v.—

PETER GRADOWSKI,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

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County of New York)

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John Boyle III
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New York, NY 10020

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Annabelle Cheney

Sworn to before me this

12 day of August 1974

Alma Hanson

ALMA HANSON
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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1710

UNITED STATES OF AMERICA,

Appellee,

—v.—

PETER GRADOWSKI,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Peter Gradowski appeals from a judgment of conviction entered in the Southern District of New York on May 17, 1974 after a four day trial before the Honorable Harold R. Tyler, Jr., United States District Judge, and a jury.

Indictment 73 Cr. 841, filed on September 4, 1973, charged Gradowski * in eleven counts with (a) possession of property stolen from a bank worth more than $100 (Counts One through Four), (b) mail fraud (Counts Five through Eleven) and (c) use of a fictitious name to perpetrate a mail fraud (Count Twelve), in violation of Title 18, United States Code, Sections 2113(c), 1341 and 1342, respectively.

* Gradowski's co-defendant, Richard Nash, entered a guilty plea to each count naming him as a defendant on October 16, 1973.

Trial commenced on October 16, 1973 and ended on October 19, 1973 with the jury finding Gradowski guilty on Counts One through Four, Seven, Nine and Twelve and not guilty on the remaining counts.

On November 23, 1973, Judge Tyler sentenced Gradowski pursuant to the provisions of Title 18, United States Code, Section 4208(b) and (c) for a psychiatric study to assist him in determining his ultimate sentence. Thereafter, on May 17, 1974, Judge Tyler imposed a sentence of concurrent terms of 15 months imprisonment on Counts One through Four and concurrent five year terms of probation on Counts Seven, Nine and Twelve.

Gradowski is presently serving his sentence.

Statement of Facts

The Government's Case.

A. Introduction.

The prosecution in this case established that Gradowski and his accomplices had perpetrated a sophisticated scheme to steal approximately $350,000 from The Chase Manhattan Bank, N.A. ("Chase") and diverse other parties. To accomplish their scheme, the accomplices opened three bank accounts in New York City under the false and fictitious names of Murray Fischer and Gary Essig. They then deposited into the Essig and Fischer accounts four checks stolen from Chase which were intended in their authentic form to be used to pay interest to the holders of two series of corporate bonds. Once the checks had cleared, Gradowski's confederates attempted to complete their scheme by transferring the funds created with the deposit of the four stolen checks into a brokerage account under their control.

B. The theft and scheme to defraud.

In the fall of 1972, Chase in its role as interest paying agent on two series of corporate bonds, one issued by the Public Service Electric and Gas Company ("Public Service") and one by the Virginia Electric and Power Company ("Virginia Electric"), was preparing to issue checks in payment of the semi-annual interest due holders of the bonds. Two of the Public Service checks, one in the amount of $177,588.75 and one in the amount of $106,575 were destined for the New York State Teachers Retirement System and the State of California Teachers Retirement System, respectively; two of the Virginia Electric checks, one for $42,625 and one for $38,750 were to be mailed to the Public Employees Retirement Board of Ohio and the Public Employers Retirement Association of Colorado State, respectively. In a manner unknown to Chase, these four checks were destroyed and in their place appeared four previously blank, spare checks of the same type which had been stolen from Chase and which in all respects duplicated the appearance of the authentic checks except that the stolen checks (hereinafter the "spurious checks") were drawn so as to be payable to a "Gary Essig" and a "Murray Fischer" (Tr. 198-208, 229-239, GX 12, 21, 23, 32, 43, 44A, 44B).*

Prior to the date the spurious checks came to light, Gradowski and Richard Nash were busy making ready for the appearance of them. In November, 1972, Nash opened accounts at three firms offering secretarial and phone answering services to customers in Manhattan. At one, an account was opened in the name of "Intertran" by its pur-

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* The issues defendant raises on appeal relate to his motion to suppress certain evidence. The transcript of the hearing relating to that motion has been reproduced as an appendix to defendant's brief on appeal. References to that appendix are denoted herein as " A." References to the trial transcript are denoted as "Tr. ;" references to Government exhibits are denoted as "GX ."

ported officer "Luis Osorio;" at another, an account was opened in the name of "Gary Essig-Fischer;" and at the third, an account was opened for an allegedly new business firm with the name "Log Press" by its principle, "Murray Fischer" (Tr. 73-78, 90-99, GX 1, 2A, 2B, 3-5, 5A).

With the stage thus set, the accomplices approached four banks at the end of November, 1972 in order to open checking accounts with them. On November 22, 1972, Nash succeeded in opening an account at the Franklin National Bank ("Franklin") in the name of Essig, giving as his home address the address of the secretarial service where an account was opened in the name of Essig-Fischer and giving as the address of a reference the address of the secretarial service where an account had been opened in the name of Intertran. Gradowski, using a similar ploy, opened an account at Bankers Trust Company ("Bankers")* in the name of Log Press for the use of Murray Fischer on November 24, 1972. On the same day, an account was opened at a branch of Chase in the name of Essig. Earlier, an unsuccessful attempt had been made by two men to open an account at the Irving Trust Company in the name of Fischer (Tr. 21-25, 100-107, 110-115, 120-126, GX 6-10, 16-19, 28-30, 39, 39A).

On December 1, 1972, the spurious check for $177,588.75 was deposited into the Log Press account at Bankers, and the $106,575 check was deposited into the Essig account at Chase. Four days later, the remaining two checks were also deposited, the one for $38,750 at Franklin and the one for $42,652 at Bankers. The four checks were quickly cleared for payment. On December 6, 1972, the day after

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* During the time defendant was a fugitive, the officer with whom defendant dealt in opening the account identified defendant's photo out of a spread of 11 photographs. After defendant's arrest, he selected defendant out of a lineup. At trial, he again identified defendant as the individual who called himself Murray Fischer (Tr. 22, 30-31, 47-48, 169-172, GX 27A, 72-72J).

the last two checks had been deposited, Gradowski and a local attorney, Stanley S. Cohen, went to the brokerage house of H. Hentz & Company ("H. Hentz"), where they opened a joint account in the names of Fischer and Cohen * (Tr. 25-32, 50-55, 107-110, 115-119, GX 11, 12, 20-23, 31, 32, 41A, 41B, 41C).

Immediately after the account was opened at H. Hentz, a check in the amount of $175,000 drawn on the Fischer account at Bankers was deposited to the brokerage account. Several days later, a certified check, this time in the amount of $100,000 and drawn on the Essig account at Chase, was deposited with H. Hentz. However, before the money could be withdrawn for the personal use of the co-schemers from the H. Hentz account, the scheme collapsed (Tr. 55-59, GX 24, 36).**

The Defendant's Case

Gradowski introduced no evidence.

The Motion to Suppress.

On appeal, Gradowski challenges only the District Court's denial of his motion to suppress certain documents

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* The individual with whom the account was opened at H. Hentz selected Gradowski's photo out of a spread of 11 photographs prior to trial and positively identified Gradowski at trial as the man who had called himself Murray Fischer (Tr. 51, 57-58, 169-171, GX 72-72J).

** In addition to the two positive eyewitness identifications of defendant at trial, both of which were strongly buttressed by pretrial identification procedures, defendant was tied to the scheme to defraud by proof that a few months later he had engaged in virtually an identical scheme in Florida (Tr. 239-252, 264-265). Furthermore, a number of incriminating documents were seized from the trunk of defendant's car by the F.B.I. during the period when he was a fugitive in this case (Tr. 154-159, 178-185). These documents were the subject of the motion to suppress described in the pages which follow.

seized from his car by the F.B.I. on April 13, 1973. The facts relating to this motion were developed at a suppression hearing held on the application of the co-defendant Nash.* The facts thus developed are as follows.

Warrants for the arrest of Gradowski and Nash for a violation of Title 18, United States Code, Section 371 were issued on January 23, 1973.** Three months later the men were still fugitives. On April 13, 1973, as part of the effort to locate and apprehend them, two F.B.I. agents, Richard McMullen and Anthony Scuderi, drove to the home of Nash's sister, Mary Hammer, and her husband in Suffolk County, some 75-80 miles from New York City. They had previously visited the Hammers on February 6, 1973 for the same purpose without success (41A-42A, 44A, 85A).

As they drove into the driveway leading to the house, the two agents noticed a green Cadillac parked to the rear of the property which aroused their suspicion because they had not seen the car on their earlier visit. Mr. Hammer approached them as their car stopped. The agents asked him who owned the Cadillac, and he responded that it belonged to a friend. The agents then announced that they wished to speak to Mrs. Hammer about Nash's whereabouts, but both Mr. Hammer and Mrs. Hammer, who also was at home, declined on the advice of counsel to talk to the agents. Both agents returned to their car and left the Hammers' property, McMullen noting the license plate number of the Cadillac (42A-44A, 86A-87A).

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* Nash's suppression hearing was held on July 16, 1973 (under superseded indictment 73 Cr. 610), a date on which Gradowski was still a fugitive. Gradowski was given the option of having his own hearing when he moved to suppress but chose to rely on the record developed at Nash's hearing.

** The original warrants and the return thereon may be found in the files of the United States Magistrate for the Southern District of New York under *United States* v. *Nash and Gradowski* (Dkt. No. 73-111).

After a fruitless attempt to reach their office over the car's radio, the two agents drove to the Sixth Precinct of the Suffolk County police to determine to whom the Cadillac belonged. There they discovered that the car belonged to Gradowski. Attempting first to send a police radio car to the scene, the two agents in the company of two or three Suffolk County police officers hurried back to the Hammer household (43A-45A, 87A, 95A).

Upon their arrival, the two agents were greeted once again by Mr. Hammer. They asked him why he hadn't told them that the Cadillac belonged to Gradowski. He responded that he thought the agents already knew that.* At this point, the agents said they would like to look through the house to determine whether either Nash or Gradowski was present. Mr. Hammer asked if the agents had a search warrant. The agents said that they did not but that when they had "reason to believe that the fugitives [for whom they had arrest warrants] could be located at the residence", a search warrant was not necessary (96A). Mr. Hammer then permitted the agents to enter his home, and in his company a walk-through search of the house for the fugitives was conducted.** Neither fugitive was discovered (45A-46A, 87A-88A).

While in the house, the agents asked Mr. Hammer how the Cadillac had come to be on the premises, and he said that it had been delivered there the preceding evening by a man named "Jack." The agents then asked for permission to search the Cadillac. Mr. Hammer immediately told his wife to get the keys and turned them over to the agents.

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* The agents may have been told on their visit two months earlier that Gradowski or Nash owned a Cadillac (106A).

** Although the agents did warn the Hammers of the statutory provisions against harboring fugitives, there is no suggestion in the record that the agents attempted in any manner to frighten the Hammers or that they treated them other than with the utmost politeness and courtesy.

McMullen went to search the car; Scuderi went with the Suffolk County police officers to look for Gradowski at a different location where the officers believed he might be (46A-47A, 88A, 90A).

As McMullen approached the Cadillac, he saw in the back seat of the car "an unrolled sleeping bag," "part of a sandwich" and "half a cup of coffee," among other items that indicated the car had just recently been lived in (47A-48A). He then began his search of the vehicle. Upon reaching the trunk, he found it filled with a "lot of stuff," including a "spare tire," "articles of clothing," and a "convertible top," in the midst of which he discovered a red legal-sized manila folder filled with papers (74A). Noting that the documents contained "lead[s] as to where they [the fugitives] were and where they may have been", he stuffed a few stray papers into the folder and removed it from the car (77A). Scuderi returned to the house just as McMullen was completing his search, and McMullen turned the folder over to him with the idea that the documents in it would be helpful in locating the fugitives (47A-50A, 72A-79A, 88A-90A, 103A-104A, 107-108A).

Scuderi showed the Hammers the manila folder and its contents and told them he would be taking those items with him. Mr. Hammer then said:

> Look, I want you to take the keys of this car. I want you to take the car. . . . I don't want anything to do with it. I am not involved with these individuals, and they have caused me enough trouble. . . . Here are the keys to the car, and I would like you to remove the car from my property (50A).

Scuderi took the keys, leaving behind a receipt for them. Two weeks later, after it had been determined that the F.B.I. would not take custody of the car, the keys were returned to Mr. Hammer. Shortly thereafter, the car was

moved by Mr. Hammer to the nearby house of Gradowski's mother (50A-52A, 90A-93A, Suppression GX 1).

Before trial Gradowski moved to suppress the documents seized from his car on April 13, 1973. For purposes of identification, those documents had been separated at the Nash suppression hearing into two groups. The first group (Suppression GX 3) comprised the documents which the Government intended to introduce at trial and included blank checks similar in nature to the spurious checks, invoices relating to the secretarial service accounts that had been opened, checks and deposit slips, some blank and some partially or fully completed, relating to the Fischer and Essig bank accounts, a small notebook containing various names and addresses and miscellaneous other documents. The second group (Suppression GX 4), constituting the majority of documents, covered those items which the Government represented it would not introduce at trial and included social security cards and driver's licenses in several different names, envelopes, bills, a map of Alabama, od slips of paper with names, addresses and telephone numbers on them, gas and car repair receipts and various other papers. Judge Tyler denied Gradowski's motion, holding that the Hamers had consented to the search and that the search qualified under the automobile exception to the need for a warrant (12A-24A). At trial the first group of documents identified at the suppression hearing were introduced into evidence.

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* For a complete list of these exhibits, see the trial testimony of agent Lee Norton (Tr. 178-185).

ARGUMENT

POINT I

Viewed in light of all of the surrounding circumstances, the Hammers' consent to the search of defendant's car was voluntarily given.

Gradowski's sole contention on appeal is that the search of his car on April 13, 1973 was improper. In this connection, he contests the District Court's decision upholding that search on the alternate grounds that it was consented to and that it fit within the automobile exception to the need for a search warrant. With respect to the former ground, he contends that the agents statement that they did not need a search warrant to look for the fugitives in the Hammers' house when they had an arrest warrant and reasonable grounds to believe the fugitives were present tainted the Hammers' consent to the search of his car. This taint, he concludes, showed that the Hammers' seeming consent to the car search was merely a form of acquiescence to lawful authority.*

The validity of a search based on current turns on whether the consent was voluntarily given. *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973); *United States* v. *DeMarco*, 488 F.2d 828, 830-831 (2d Cir. 1973). "[W]hether

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* Gradowski makes no claim that the Hammers lacked authority to consent to the search of his car. Nash had, in any event, testified at his suppression hearing that he had been authorized by Gradowski to use the Cadillac and that he in turn had authorized the Hammers to use it (113A-127A). As a result, a claim that the Hammers' lacked authority to consent to the search of Gradowski's car would not be sustained. *United States* v. *Matlock*, 42 U.S.L.W. 4252 (U.S. Feb. 20, 1974); *United States* v. *Jenkins*, 496 F.2d 57 (2d Cir. 1974).

a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." *Schneckloth* v. *Bustamonte, supra,* 412 U.S. at 227. While the Government has the burden of sustaining that the consent was voluntarily given, "the government need not establish . . . knowledge [of the right to refuse consent] as the *sine qua non* of an effective consent." *Id.* at 227. Lastly, a finding of consent by the trial court "is a finding of fact that should not be lightly overturned" on appeal. *United States* v. *Bracer,* 342 F.2d 522, 524 (2d Cir.), *cert. denied,* 382 U.S. 954 (1965); *United States* v. *Gaines,* 441 F.2d 1122, 1123 (2d Cir. 1971).

Gradowski does not challenge Judge Tyler's holding that the Hammers consented to a search of his car * but argues that under the law that consent could not have been voluntary. He looks to the line of cases having their genesis in *Bumper* v. *North Carolina,* 391 U.S. 543 (1968) to support his argument that there was simply an acquiescence to lawful authority. *See, e.g., United States* v. *Mapp,* 476 F.2d 67 (2d Cir. 1973); *Holloway* v. *Wolff,* 482 F.2d 110 (8th Cir. 1973). The common thread running through those

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* Judge Tyler found:

> Mr. Hammer's behavior in handing over the car keys to the agents, coupled with his request that the agents relieve him of the car altogether, is conduct tantamount to a consent, thus rendering the search reasonable. A person consenting to a search need not have a positive desire that the search be conducted in order for his consent to have been voluntary and effective. *United States* v. *Thompson,* 356 F.2d 216, 220 (2d Cir. 1965), *cert. denied,* 384 U.S. 964 (1966). The Hammers were neither overborne by the superior authority of the agents nor were they subjected to other forms of coercion, blatant or subtle. To the contrary, the Hammers had experienced prior contact with these same agents and had felt free on a previous occasion to refuse requests of the agents pursuant to advice of counsel. (20A)

cases is that the consent to search was secured by an assertion of lawful authority to search under an invalid search warrant and by a strong show of force.* The facts underlying this case are quite different.

To begin with, the only circumstance even hinting of coercion was the agents' assertion that they could enter the Hammers' house without benefit of a search warrant in order to ascertain whether the fugitives were present. Unlike in *Bumper* and its progeny, however, the statement of the agents in this respect was not a misstatement as to their lawful authority. Cf. *United States* v. *Pomares*, Dkt. No. 74-1219 (2d Cir., July 5, 1974) slip. op. at 4720. A police officer acting under an arrest warrant may enter a home to search for a missing fugitive if he has "reasonable grounds" to believe that the fugitive is present within. *United States* v. *Brown*, 467 F.2d 419, 423 (D.C. Cir. 1972); *United States* v. *Jones*, 475 F.2d 723, 729 (5th Cir. 1973); *Vance* v. *State of North Carolina*, 432 F.2d 984, 990-991 (4th Cir. 1970); *see also United States* v. *Mapp*, *supra*, 476 F.2d at 74. In the instant case the apparently recent appearance of the Cadillac on the Hammers' property,** the fact that Mrs. Hammer was Nash's sister and the Hammers' attempt to conceal the identity of the owner of the car gave McMullen and Scuderi

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* In *Bumper*, for example, "Mrs. Hattie Leath, a 66 year-old Negro widow, in a house located . . . at the end of an isolated mile-long dirt road" was suddenly confronted by four white law enforcement officers who told her they had a warrant to search her house. She "consented" by saying, " 'Go ahead'," and by opening the door. *Bumper* v. *North Carolina*, *supra*, 391 U.S. at 546. More recently, in *Mapp*, a large number of agents bent on arresting several suspects burst into an apartment in the middle of the night with guns pulled, arrested the occupants and demanded to be told the location of a package of narcotics. The woman to whom the demand was directed "consented" to the search by pointing to the closet where the package could be found.

** The agents had not seen the car there on their earlier visit, and the Hammers had told them that a "Jack" had left the car there the evening preceding the search (44A-47A, 86A, 90A).

reasonable grounds to believe one or both fugitives were present in the house. *United States* v. *Brown, supra,* 467 F.2d at 423-424; *United States* v. *Jones, supra,* 475 F.2d at 724-725, 729; *cf. United States* v. *Titus,* 445 F.2d 577 (2d Cir.), *cert. denied,* 404 U.S. 957 (1971). In addition, the assertion of legal authority here did not include a statement that the agents were in fact acting under benefit of a search warrant, nor did it concern the search of the property about which Gradowski now complains—the search of his car.

Other factors, moreover, militate even more heavily against Gradowski's argument. First, the atmosphere surrounding the request to search was not coercive. *Schneckloth* v. *Bustamonte, supra,* 412 U.S. at 247. The Hammers were not in custody nor the targets of an investigation, the agents were not abusive, and the request to the Hammers came in the familiar and reassuring atmosphere of their home. Second, their refusal to be interviewed by the agents concerning the whereabouts of the fugitives and their statement that they had consulted counsel establish that the Hammers were intelligent, mature people who were aware of their legal rights and fully capable of exercising them. *Cf. White* v. *United States,* 444 F.2d 724, 726 (10th Cir. 1971). Third, there was nothing in the agents' request to search the Cadillac which explicitly or implicitly asserted the right to do so regardless of the wishes of the Hammers.*

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* The Hammers could easily distinguish between the search of their house for the person of the fugitives, based on an arrest warrant but not a seach warrant, and a search of Gradowski's car, a search not for the person of the fugitives but for other evidence, for which the agents' stated rationale for their initial search without a search warrant could have had no conceivable application. Moreover, even if the Hammers' consent to the search of the car was based on a mistaken belief that the agents had a right to search the Cadillac under the arrest warrant just as they had properly claimed in connection with the search of the house, nothing in *Schneckloth* suggests that such a misapprehension would vitiate the voluntariness of their consent in the absence, as here, of any coercion or claim of lawful right by the agents to search the Cadillac.

Fourth, while it was understandable that the Hammers might not have wanted their home searched, the Cadillac was not their property and not something they were interested in. It is, furthermore, extremely unlikely that they had any idea that incriminating evidence would be found in the car or much reason to care if it was. *United States* v. *Cachoian*, 364 F.2d 291 (2d Cir. 1966), *cert. denied*, 385 U.S. 1029 (1967); *United States* v. *Smith*, 308 F.2d 657, 663 (2d Cir. 1962). Fifth, Mr. Hammer's lack of interest in the car and his desire to have the car removed from his property were emphatically made known to the agents. These desires were, of course, symptomatic of a voluntary consent. *Cf. Wren* v. *United States*, 352 F.2d 617 (10th Cir. 1965). Finally, the Hammers had a positive motive in permitting the search in that it was the simplest and easiest way of dispelling the suspicion which they must have realized was cast on them by their actions earlier in the day. *Coolidge* v. *New Hampshire*, 403 U.S. 443, 487-490 (1971); *United States ex rel. Combs* v. *La Vallee*, 417 F.2d 523, 524 (2d Cir. 1969).*

Viewed in light of all of the surrounding circumstances, the coercive effect, if any, created by the lawful search of the Hammers' house had a minimal impact on their subsequent decision to consent to a search of Gradowski's car. *See United States* v. *Fernandez*, 456 F.2d 638, 639-640 (2d Cir. 1972). Indeed, the facts clearly support Judge Tyler's conclusion that the Hammers' consent was voluntarily

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* Some note should also be taken of the fact that although the suppression hearing was held on the motion made by Nash, he failed to call Mr. or Mrs. Hammer, even though his claim was that their consent was involuntarily received, and even though they were close relatives of his and Mr. Hammer was present in court at his request on the date of the suppression hearing (39A-40A). *See United States* v. *Johnson*, 467 F.2d 804, 809 (1st Cir. 1972), *cert. denied*, 410 U.S. 909 (1973).

given. Since it was, the subsequent search and seizure were proper without any further legal justification.*

POINT II

Even absent consent, the warrantless search of defendant's car and the seizure made therefrom were fully justified by the facts.

Gradowski challenges the District Court's alternative determination that the search and seizure from his car were proper under the automobile exception to the need for a search warrant on three grounds. First, he argues that the agents did not have probable cause to search because they could not have known what "'particular . . . thing [ ]' pertaining to the whereabouts of the defendant would be in the car." Defendant-Appellant's brief, p. 34. He contends secondly that even conceding probable cause, exigent circumstances justifying a warrantless search did not exist inasmuch as the agents could have immobilized the car while they went for a warrant. Finally, he argues that the seizure of the documents from the Cadillac was overly broad since it included all of the papers which the agents found in the trunk.

Contrary to Gradowski's contentions, the search here satisfied in all respects the automobile exception to the Fourth Amendment's requirement regarding search warrants. It is uncontested that before he began his search of the Cadillac McMullen knew that it belonged to Gradowski

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* Although Scuderi told the Hammers that he only wanted to take the envelope found in the trunk, Mr. Hammer virtually demanded that the agents take the entire car. If the agents were entitled to take the entire car, they could lawfully have seized any and all items in it. As a result, Gradowski's argument that the seizure from his car was impermissibly broad has no application to the consent justification for the search.

and was parked on the property of Nash's sister. He also knew that warrants had issued for the arrest of both Gradowski and Nash. In addition, it appeared that the Cadillac had arrived at the Hammers' property only the day before, and Mr. Hammer had attempted to conceal the identity of its owner from the agents. From outside of the car McMullen could determine from the condition of its interior that at least one individual had been recently traveling and sleeping in it. In short, McMullen had ample cause to believe, as he did, that the car had been recently used by Gradowski or Nash or both and that it contained evidence—bills, maps, receipts and even matchbooks and food wrappers—showing where it and its occupants had recently been. *See United States* v. *Capra*, Dkt. No. 74-1068 (2d Cir., July 26, 1974), slip op. at 5005-5008; *United States* v. *Shye*, 473 F.2d 1061, 1064-1065 (6th Cir. 1973); *United States* v. *Free*, 437 F.2d 631, 633-635 (D.C. Cir. 1970). Such evidence was subject to seizure because it was "evidence which would aid in apprehending and convicting criminals."* *Warden* v. *Hayden*, 387 U.S. 294, 306 (1967); *see also United States* v. *Ellis*, 461 F.2d 962, 966 (2d Cir.), *cert. denied*, 409 U.S. 866 (1972). Under the circumstances, McMullen was entitled to search the car without a warrant. *Cardwell* v. *Lewis*, 42 U.S.L.W. 4928 (U.S., June 17, 1974); *Coolidge* v. *New Hampshire*, *supra*; *Chambers* v. *Maroney*, 399 U.S. 42 (1970); *Carroll* v. *United States*, 267 U.S. 132 (1925).

Gradowski responds that McMullen could not have had probable cause because he did not know specifically what it was he would find as a result of his search. Apart from the situation when First Amendment rights are involved,

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* Evidence of the recent whereabouts of Gradowski and Nash would have aided in both their apprehension and their conviction. Obviously, evidence of where they and the Cadillac had recently been would have furnished leads to their present whereabouts. Nash, in fact, admitted at the suppression hearing that many of the documents showed exactly where he and Gradowski had been while they were fugitives (141A-147A). Furthermore, such evidence might well have established the fact of flight, which would have been admissible at trial to prove consciousness of guilt.

e.g., Stanford v. *Texas*, 379 U.S. 476 (1965), the specificity requirement for searches and seizures is relatively flexible, and a warrant is satisfactory in this regard provided the property to be seized is sufficiently identifiable to prevent a general or roving search. *United States* v. *Sultan*, 463 F.2d 1066, 1070 (2d Cir. 1972); *United States* v. *Scharfman*, 448 F.2d 1352 (2d Cir. 1971), *cert. denied*, 405 U.S. 919 (1972). Particularly is this so when a generic class of documents or other property is sought. *United States* v. *Scharfman*, *supra*, 448 F.2d at 1355; *James* v. *United States*, 416 F.2d 467, 473 (5th Cir. 1969), *cert. denied*, 397 U.S. 907 (1970). Here the agents were looking for bills, maps, receipts and any other documents which would help reveal the whereabouts of the fugitives, a category of property sufficiently specific to satisfy the law. *Cf. United States* v. *Ellis*, *supra*, 461 F.2d at 966.

Gradowski further contends that since it was humanly possible to immobilize his car while a warrant was sought, there could not have been exigent circumstances justifying a warrantless search. The courts have, however, uniformly rejected this immobilization contention. *See, e.g., Cardwell* v. *Lewis*, *supra*; *Chambers* v. *Maroney*, *supra*, 399 U.S. at 50-52; *United States* v. *Carneglia*, 468 F.2d 1084, 1089-1090 (2d Cir. 1972), *cert. denied sub nom. Inzerillo* v. *United States*, 410 U.S. 945 (1973); *United States* v. *Castaldi*, 453 F.2d 506, 509-510 (7th Cir. 1971), *cert. denied*, 405 U.S. 992 (1972). The concept behind the exigent circumstance requirement seems to be centered, rather, on the idea that the circumstances furnishing probable cause "were unforeseeable prior to the time that the opportunity to search arose." *United States* v. *Free*, *supra*, 437 F.2d at 634.* Such was the case here. In any

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* The existence of such unforeseeable circumstances was of crucial significance to the court's opinion in *Chambers* v. *Maroney*, *supra*, 399 U.S. at 50-51. Their absence was one of the major reasons for the conclusion reached in *Coolidge* v. *New Hampshire*, *supra*, 403 U.S. at 458-464. *Cardwell* v. *Lewis*, *supra*, suggests, however, that exigent circumstances in automobile search cases arise merely from the nature of an automobile.

event, for many of the same reasons that gave rise to probable cause for the search—Gradowski's and Nash's fugitive status, the lack of candor on the part of the Hammers, the recent appearance of the car and the fact that a federal magistrate was more than 35 miles away (42A)—an immediate, warrantless search was fully justified. *Cf. United States* v. *Shye, supra,* 473 F.2d at 1064-1065; *United States* v. *Carneglia, supra,* 468 F.2d at 1089-1090; *United States* v. *Ellis, supra,* 461 F.2d at 966.

Finally, Gradowski contends that the seizure was improper because it was overly broad. A roving search and seizure is, of course, constitutionally impermissible. *Stanford* v. *Texas, supra.* There was nothing approaching a general search in this case. Both the interior and the trunk of the Cadillac were filled with numerous items. The only thing taken by the agents was a legal-sized, red manila folder which contained a number of papers. McMullen thumbed through these papers, noting that they identified specific locales where Gradowski and Nash had apparently been and thrust them back into the envelope. He picked up a few additional papers that appeared to have fallen out of the envelope (77A-78A) but did not take any of the other tangible items in the car. McMullen seized, then, one envelope containing documents which he reasonably believed would shed light on the fugitives' whereabouts.* He was in no position to make an on-the-scene determination of the ultimate value of each paper in the envelope and did not have to do so. *United States* v. *Masiello,* 330 F. Supp. 1269 (S.D.N.Y.), *aff'd,* 445 1324 (2d Cir. 1971), *cert. denied,* 404 U.S. 1060 (1972).

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*It could be argued that the seized items introduced at trial did not show the whereabouts of the fugitives. Many of those items had a dual nature, however, and while incriminating they were also useful for the purpose for which they were seized. For example, a receipt showing that a secretarial service account had been opened (GX 2A, 2B, 4, 5) could also be extremely useful in locating a fugitive.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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